

TITLE 327 WATER POLLUTION CONTROL BOARD

LSA Document #09-213

SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST PUBLIC HEARING

On May 11, 2011, the Water Pollution Control Board held the first public hearing/board meeting on new rules and amendments to rules at 327 IAC 15 concerning concentrated animal feeding operations. Comments were made by the following persons:

Livestock and Poultry Rule Revision Group (LPRRG)
Justin Schneider, Indiana Farm Bureau (JS)
Todd Janzen, Indiana Professional Dairy Producers (TJ)
David Hardin, Indiana Pork (DH)
Kristin Whittington, Landmark Enterprises (KW)
Michael Veenhuizen, Livestock Engineered Solution, Inc. (MV)

Following is a summary of the comments received and IDEM's responses thereto.

Comment: While we have reservations about losing the streamlined general permitting process for CAFOs, we appreciate IDEM's willingness to establish a future general permit process. We support the transition language in 327 IAC 15-16-3 for CAFOs opting out of the NPDES program. (LPRRG)

Response: IDEM will evaluate the need for CAFO general permits should the need arise to have such permits in the future.

Comment: We are at a disadvantage because guidance from EPA for implementing the rule has largely come from EPA and there has not been much information. We can only surmise how the rule may be interpreted. We ask that IDEM consider general permits for CAFOs if things change at the federal level and we find that more operations are required to obtain NPDES permits. (JS)

Response: IDEM will evaluate the need for CAFO general permits should the need arise. Currently, IDEM believes the state CFO regulations and NPDES individual permit requirements for discharging CAFOs provides a comprehensive and effective regulatory program within Indiana.

Comment: We are still concerned about overlaps between the CFO and CAFO rules. IDEM should consider our latest comments on LSA Document #09-615 as part of these comments where the state CAFO NPDES program incorporates CFO provisions. (LPRRG)

Response: IDEM considers all relevant comments during the rulemaking process. This rule and the proposed rules for confined feeding operations (LSA Document #09-615) were coordinated to provide consistency between the rules and produce a level playing field for all producers.

Comment: 327 IAC 15-16-1. 327 IAC 15-16-1(d) states that a land application discharge that is not considered an agricultural storm water discharge requires an NPDES permit. The recent 5th Circuit decision in National Pork Producers Council v. EPA (No. 08-61093) greatly limits when a facility can be required to obtain an NPDES permit. The court's opinion states that the Clean Water Act mandates that "a discharging CAFO must have a permit," and a "discharging CAFO has a duty to apply for a permit." These are references to ongoing discharges of a CAFO. A one-time land application discharge for which the circumstances giving rise to the discharge have been corrected is no longer an ongoing discharge.

Subsection (d) should be amended to read: "... CAFO owner or operator is a discharge *which may be* subject to NPDES permit requirements under this rule...". In addition, the concept of not requiring an NPDES permit for an isolated discharge which has been corrected should apply for incidents caused by events outside of manure application. (LPRRG) (JS)

Response: IDEM generally agrees that a one-time discharge from land application where the circumstances that caused the discharge have been corrected should not require the producer to obtain an individual NPDES permit. However, each case is fact-sensitive and must be evaluated on its own merits.

Comment: 327 IAC 15-16-5. This section incorporates 327 IAC 19-8-7 and IC 4-21.5, neither of which refers to a list of "potentially affected persons." Instead of "potentially affected persons" the list should consist of those persons who would be in the notification area described in 327 IAC 19-8-7(a)(2). (LPRRG) (TJ)

Response: The notice requirements of the Administrative Orders and Procedures Act (IC 4-21.5) remain in effect whether or not they are referenced in this rule. This section will be amended to reference the requirements of IC 13-18-10-2, which is also found in draft 327 IAC 19-8-7, as well as those parties long considered potentially affected under administrative law decisions interpreting IC 4-21.5, namely, land owners or occupants of land adjoining the property which is the subject of the permit.

Comment: 327 IAC 15-16-7(d) and (e). We question whether the requirement in subsection (e) to meet the water quality standards of 327 IAC 5 is tempered by the standard in subsection (d) that an overflow may be allowed in certain cases. If it is not, how would a livestock producer know if the water quality standards are being violated? We do not see how a producer can meet the water quality standards during a significant rainfall or subsequent flood event during a 25 year, 24 hour storm event. The reference here should be to 327 IAC 2 which addresses water quality standards. This provision is a trap for a dairy producer who is allowed to discharge during a once in a lifetime event, but is required to meet water quality standards that cannot be complied with during that event. (LPRRG) (TJ)

Response: The reference to the water quality standards will be corrected. However, the water quality standards in 327 IAC 2 are established under Indiana law and cannot be set aside in this rule.

Comment: 327 IAC 15-16-7(g). This subsection should be revised to read: "land application areas *owned or controlled by the CAFO....*" This will clarify that the records are for the land which the CAFO controls as compared to land upon which manure that was marketed by the CAFO was land applied. (LPRRG)

Response: This provision does not apply to marketed manure. The section will be revised to clarify that it applies to land upon which the CAFO applies manure.

Comment: 327 IAC 15-16-9. The rule should identify clear and effective methods for preparing nutrient management plans. The most efficient way to manage the nutrient management plan submission requirements in the 2008 EPA CAFO Rule would be for IDEM to allow the use of programs like Purdue University's Manure Management Planner to serve as the submission of a "narrative approach" nutrient management plan. (LPRRG) (MV)

Response: The federal rule does not prohibit the use of such programs as the Purdue program. It does, however, require the submittal of the methodologies used. The language of this section will be

amended to allow use of these applications.

Comment: 327 IAC 15-16-9(j). This requirement is not clear in light of the language in 40 CFR 122.42(e) which requires that changes to nutrient management plans be submitted and the Director determines if those changes are substantial or not. Non-substantial changes must be made available to the public, while substantial changes require public notification and provision for public review and comment. People without the necessary training or qualifications will try to pick those plans apart. Is the owner or operator required to submit all changes to IDEM, in which case will IDEM determine which ones are substantial? Or is the owner or operator required only to submit substantial changes? IDEM should provide clarification on what changes are considered substantial. (LPRRG) (DH)

Response: IDEM will revise the rule language to clarify that changes must be submitted to the Commissioner and IDEM will determine which changes are substantial and require public notice.

Comment: 327 IAC 15-16-9. IDEM should provide a capability for nutrient management plans, changes and public notices to be submitted electronically. Notification of approvals must be made quickly electronically or by telephone followed by written communication. Generally changes to the nutrient management plan occur because weather conditions force a change in crop planting. Those decisions take place in a short time period. Delays will negatively impact crop production and impair the farmer's profitability. (LPRRG) (DH)

Response: IDEM will allow for electronic submittal of changes. The public notice requirement in 327 IAC 15-16-9(j) requires 7 days notice to the public. This requirement is derived from 40 CFR 122.42(e) and cannot be waived. Use of the "narrative rate approach" described in 40 CFR 122.42(e)(5)(ii) will include these adjustments and minimize the need for additional public notices.

Comment: 327 IAC 15-16-10(c). Please clarify this subsection. (LPRRG)

Response: This language is standard reopener language required by EPA and the Clean Water Act for all permits. It precludes using the existence of a permit as an excuse to violate these rules.

Comment: 327 IAC 15-16-11. Subsection (a) references maintaining records for marketing and distributing manure. Subsection (b) discusses minimum acreage which must be available. If an operation markets its manure, the operation should be able to make such a showing and reduce the acreage required for land application. (LPRRG) (KW)

Response: Reducing the required acreage to account for marketed or distributed manure is provided for in 327 IAC 15-16-11(b)(3). The missing language will be added.

Comment: 327 IAC 15-16-11(b)(1). We do not believe that land use agreements for manure application should only be signed by the property owner, since a tenant farmer or farm manager may have the authority to contract for land application of manure. This subdivision should provide for the responsible party to enter into the land use agreement. (LPRRG) (TJ) (KW)

Response: IDEM agrees and will amend this language to allow signatures by persons in legal control of the property other than the property owner.

Comment: 327 IAC 15-16-12. In 327 IAC 15-16-8, under the requirements for design standards for manure storage structures, allowance is made for alternative designs to be used by those seeking NPDES permit coverage. This alternative approach should also be allowed for decommissioning manure storage

areas. 327 IAC 15-16-12(a) should read: "... must do so in accordance with 327 IAC 19-15 unless an alternative compliance approach has been approved by the commissioner." (LPRRG) (MV)

Response: This section references 327 IAC 19-15 for decommissioning of manure storage facilities. 327 IAC 19-5-1, as proposed in LSA Document #09-615, provides for alternate design or compliance approaches and innovative technology for all aspects of a confined feeding operation including decommissioning of manure storage facilities.

Comment: 327 IAC 15-16-13. While we appreciate the streamlined approach to transitioning from NPDES permit to state CFO approval, we are unclear about the timing. Is the intent for the transition to take place on the effective date of the rule, with notice submitted before then, or is there a date certain for the transition? We propose giving producers six months after the effective date of the rule to submit written notification to enter the CFO program. (LPRRG)

Response: This provision will be amended to clarify the transition requirements and provide a date certain for transition to the CFO program.

Comment: 327 IAC 15-16-13. If a current NPDES permit holder chooses to remain in the CAFO NPDES program, that producer should be allowed to finish out the term of the current NPDES permit before applying for a new individual NPDES permit. (LPRRG)

Response: An existing individual NPDES CAFO permit will remain in effect until its expiration date. An NPDES general permit expires on the date that the general permit rule (327 IAC 16) is repealed and will have no remaining term to "finish out". To maintain permit coverage, a CAFO that is discharging must obtain an individual NPDES permit if it is not already covered under one, and a non-discharging CAFO must transition to the CFO program in 327 IAC 19 or close. The transition language will be amended to clarify this.

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